* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ Arb. P. No.91 of 2007

% Date of decision: 16.04.2007

M/S. BHAGEERATHA ENGINEERING LTD. ...PETITIONER
Through: Mr. George Thomas with
Mr. G.K. Jose, Advocates.

Versus

M/S. NATIONAL HIGHWAY AUTHORITY
OF INDIA LTD. & ANR. ...RESPONDENTS
Through: Mr. Sandeep Sethi, Sr. Adv.
with Ms. Divya Jain,
Advocate for Respondent No.1

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest? Yes

SANJAY KISHAN KAUL, J. (Oral)

1. The present petition has been filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the said Act) seeking appointment of a presiding arbitrator in view of the failure of the Indian Road Congress, respondent No.2, to appoint such a third arbitrator despite communication of a request in that behalf.

2. The arbitration clause between the parties is as under:

"**3. ARBITRATION (GCC Clause 25.3)**
The procedure for arbitration will be as follows:

(a) In case of Dispute or difference arising between the Employer and a domestic contractor relating to any matter arising out of or connected with this agreement, such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal shall consist of 3 arbitrators one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consesus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Council of Indian Road Congress.

(b) If one of the parties fails to appoint its arbitrator in pursuance of sub-clause (a) and (b) above within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the Council of Indian Road Congress shall appoint the arbitrator. A certified copy of the order of the Council of Indian Road Congress making such appointment shall be furnished to each of the parties."

(emphasis supplied)

... ...

3. The aforesaid arbitration clause, thus, envisaged the appointment of an arbitrator each by the two parties and a third arbitrator to be chosen by the two arbitrators appointed by the parties. Such third arbitrator had to be chosen by the two arbitrators within a period of 30 days from the appointment of the arbitrator appointed subsequently failing which the presiding arbitrator was to be appointed by the Council of the Indian Road Congress.

4. The communications placed on record show that on 16.1.2007 Mr. P.C. Sharma, the arbitrator appointed by respondent No.1 communicated to respondent No.1 the failure of any consensus for appointment of the

presiding arbitrator. As a sequitor to the same respondent No.1 addressed a letter to respondent No.2, the Indian Road Congress on 7.2.2007 calling upon it to appoint the third arbitrator. No such third arbitrator was appointed resulting in the present petition being filed.

5. Respondent No.1 had entered appearance on the last date of hearing but no reply has been filed. Learned counsel for respondent No.1, however, states that a communication has been received from respondent No.2 dated 13.4.2007. The said communication has been placed on record which points out that the time period of 30 days was stipulated only for the two arbitrators to agree upon the presiding arbitrator and such time period did not circumscribe the power of appointment of third presiding arbitrator by respondent No.2. It is further stated that the request from respondent No.1 was received by respondent No.2 on 7.2.2007 itself but the processing charges were deposited on 19.2.2007. Respondent No.2 has appointed the presiding arbitrator. However, this appointment is not acceptable to the petitioner.

6. In order to appreciate the rival contentions advanced by learned counsels for the parties, it is necessary to reproduce the provisions of Section 11(6) of the said Act, which are as under:

> "**11. Appointment of arbitrators.**
> (1)....
> (2)....
> (3)....
> (4)....
> (5)....
> (6) Where, under an appointment procedure agreed upon by the parties, -
>
> (a) a party fails to act as required under that

procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

7. A perusal of the aforesaid provision shows that unlike the provisions of Sections 11(4) & 11(5) of the said Act, there is no such prescribed period of 30 days under Section 11(6) of the said Act. The question which, thus, arises for consideration in the present case is as to within how much time should the power be exercised by respondent No.2. It is the submission of the learned senior counsel for respondent No.1 that since no time period is prescribed a reasonable time period must be envisaged and 90 days period ought to be considered as a reasonable time period. On the other hand, learned counsel for the petitioner states that though no time period is prescribed, the time period ought to be 30 days for appointment of such a third arbitrator or filing of such a petition under Section 11(6) of the said Act. It is, thus, contended that since the petition under Section 11 (6) of the said Act was filed and the appointment of the third presiding arbitrator by respondent No.2 is after the said date, respondent No.2 has lost the right to appoint the third presiding arbitrator.

8. Learned counsel in this behalf has relied upon the judgement of Apex

Court in Datar Switchgears Ltd. Vs. Tata Finance Ltd. & Anr. JT 2000 (Suppl.2) SC 226 where this aspect was discussed in paragraph 19 as under:

> "19. So far as cases falling under Section 11(6) are concerned – such as the one before us – no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, **so far as Section 11(6) is concerned,** if one party demands the opposite party to appoint an Arbitrator and the opposite party does not make an appointmnt within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but **before the first party has moved the Court under Section 11,** that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an Arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgements that if the appointment is not made within 30 days of demand, the right to appoint an Arbitrator under Section 11(6) is forfeited."

9. A reference has also been made to the Full Bench judgement of this Court in HBHL-VKS (J.V.) Vs. Union of India & Ors. and V.P. Electricals Vs. Union of India & Ors. 2007(1) Arb. L.R. 252 (Delhi) (FB) where conclusion was set out in paragraph 40 as under:

> "40. Thus, we record our answer to the two questions referred to the Larger Bench as follows:
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> (i) Once the party, which has been served with the demand notice in terms of arbitration clause, fails or refuses to act in making appointment in terms of arbitration clause within 30 days or in any case prior to institution of a

petition by the other side under Section 11(6) of the Act, then its right to make such appointment ceases or is forfeited. Such cessation is absolute in terms of the judgement of the Supreme Court in **Datar Switchgears'** case and cannot be revived.

(ii)The court has jurisdiction to take necessary measures in terms of Section 11(6) of the Act and this expression would take within its ambit and scope, the power to make appointment of independent and impartial arbitrator with reference to the accepted arbitration clause, unless the court in its discretion directs an institution specified in the arbitration clause not in default, to make such an appointment."

10.A reading of the aforesaid decisions, thus, shows that the matter in issue is no more *res integra* and the settled legal position as emerges from the two judgements is that the power to appoint the third arbitrator has to be exercised within a period of 30 days failing which the power is not extinguished till such time a petition is filed. Thereafter the power does not continue and is vested in the Court.

11.Learned senior counsel for respondent No.1 seeks to contend that those judgements are in the facts of a designated authority of one party to appoint a third arbitrator and the position ought to be different in case of an independent authority as respondent No.2. I am unable to accept this plea since no such distinction is made in the aforesaid two judgements. In any case, the principle is that the designated authority, whether it be third party or any designated person of one of the parties, must exercise

the power within 30 days or at least before the date a petition is filed under Section 11(6) of the said Act. This is also clear from a bare reading of the provisions of Section 11(6) of the said Act which envisages the failure to perform any function by any institution. The conclusion, thus, is that respondent No.2 has failed to exercise the power within the time stipulated and, thus, the third presiding arbitrator is liable to be appointed by this Court.

12. At this stage, learned counsels for the parties state that Justice R.C. Chopra (Retd.) may be appointed as the third presiding arbitrator. The said request is accepted. The fee of the arbitrator would be fixed by the arbitrator.

13. The petition is allowed leaving the parties to bear their own costs.

14. An intimation be forthwith sent to the presiding arbitrator appointed by this Court.

APRIL 16, 2007 SANJAY KISHAN KAUL, J.
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